REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL APPEAL 27 OF 2008

SAHRA HERSI ALI T/A BUNGOMA TOTAL SERVICE STATION….APPELLANT

VERSUS

GEORGE LUKAS OTIENO…….....……...RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the lower court by George Lukas Otieno, (hereinafter referred to as the respondent). He had sued Sahra Hersi Ali t/a Bungoma Total Service Station, (hereinafter referred to as the appellant). The respondent's claim against the appellant was for recovery of Kshs.144,677/= being special damages suffered by the respondent as a result of an accident. The accident involved the respondent's motor vehicle registration No.KAC 990F and motor vehicle registration No.KAE 312N, (hereinafter referred to as the tanker), which the respondent claimed belonged to the appellant. The respondent maintained that the accident was caused by the negligence of one Mr. Ngugi, a driver of the appellant.

2. In her defence, the appellant denied the respondent's claim. In particular the appellant denied being the registered owner of the tanker, and disputed the allegation that the respondent was the registered owner of motor vehicle Registration No.KAC 990F. The appellant further denied that an accident ever occurred as alleged. The appellant also denied ever employing a driver known as Mr. Ngugi.

3. In the alternative, the appellant claimed that she had no knowledge of motor vehicle registration No. KAC 990F being driven along the said road and was a stranger to the allegations of negligence. The appellant further denied being served with summons to enter appearance and claimed that the respondent's suit was time barred under the Limitation of Actions Act Cap 22 Laws of Kenya. Further, the appellant denied the jurisdiction of the court contending that she was resident in Bungoma and not in Nairobi.

4. During the hearing of the suit in the lower court, 5 witnesses testified in proof of the respondent's case. These were Michael Kimani, a motor assessor employed by Lions of Kenya Insurance Company Ltd; Mary Kiriga, also an employee of Lions Insurance Company of Kenya; Fanuel Omondi Omuga, a friend to the respondent; Police Constable Sarah Sang and the respondent.

5. Briefly their evidence was that on 19th December, 1998 the respondent was driving his motor vehicle registration No.KAC 990F along Muranga Road. He was in the company of his friend, Fanuel Omondi. As the respondent's vehicle approached Muranga Road/Ngara Roundabout, the tanker came from the rear and hit the respondent's motor vehicle from the rear and along the side. The tanker did not stop but moved on after the accident.

6. The respondent reported the accident at Pangani Police Station and was issued with a police abstract report of the accident. The report was recorded in the occurrence book which was produced in court by Constable Sarah Sang, an officer then attached to Pangani Police Station. The respondent also produced a certificate of ownership for the tanker from the Registrar of Motor Vehicles, which confirmed that the registered owner of the tanker was the appellant.

7. The respondent reported the accident to his insurers Lion of Kenya Insurance Co. Ltd. The motor vehicle was later assessed by Michael Kimani who estimated the cost of repair at Kshs.127,103.25, charging a fee of Kshs.3000/= for the assessment. Kimani noted that the excess payable arising from the accident was Kshs.31,000/=. The motor vehicle was later repaired by Undugu Society.

8. The appellant testified through Abdi Hersi Moghe, (Moghe) who stated that the appellant was his sister. At the material time Moghe was working for the appellant as manager of Bungoma Total Service Station. Moghe explained that the tanker belonged to Bungoma total Service Station. He denied receiving any accident report in respect of the tanker. He denied knowledge of a driver by the name Ngugi and maintained that they never used to come to Nairobi for their products. He maintained that at the time of the alleged accident, the tanker was at their yard in Bungoma.

9. Both counsel filed written submissions each urging the court to find in favour of his client. For the respondent it was maintained that the respondent had produced a copy of the record from the Registrar of Motor Vehicles confirming that the tanker belonged to the appellant. Moreover, ownership of the tanker was admitted by the appellant's witness. It was maintained that the appellant was properly served through Sarah Hersi Ali.

10. It was further submitted that the respondent had proved through the police abstract report and the extract from the occurrence book that the accident had been indeed been reported at the police station. Further, both the respondent and his passenger Fanuel Omondi Omuga noted the registration number of the tanker. The court was therefore urged to find the appellant liable. It was further maintained that appropriate evidence was adduced in proof of the special damages claimed.

11. For the appellant it was submitted that the respondent's evidence that an accident occurred involving the appellant's tanker was not established. It was contended that there was no evidence to confirm that the accident did occur and therefore the court should accept the evidence given for the appellant.

12. In his judgment, the trial magistrate believed the evidence for the respondent and rejected the evidence for the appellant. He found that an accident did occur involving the appellant's tanker and that the accident was reported. He further noted that the evidence of the respondent regarding the accident was corroborated by the evidence of his passenger. The trial magistrate therefore found the appellant vicariously liable. The trial magistrate further found that adequate evidence was adduced in proof of the special damages claimed and that the respondent's insurer having paid for the costs of repairing the accident it was entitled to recover the same under the doctrine of subrogation.

13. Being aggrieved by that judgment, the appellant has lodged this appeal raising 11 grounds as follows:

(i) The learned magistrate erred in law and in fact in holding that the appellant was liable for the occurrence of the accident on the 19th day of December, 1998.

(ii) The learned magistrate erred in law and in fact holding that the appellant was the owner of motor vehicle Registration number KAE 312 N which was involved in an accident on the 19th day of December, 1998.

(iii) The learned magistrate erred in law and in fact in holding that the appellant motor vehicle was entirely liable for the alleged accident involving motor vehicle registration number KAE 312N.

(iv)The learned magistrate erred in law and in fact in holding that the amendment of the plaint filed on 23rtd February, 2007 was not to include as new party was not the barred under invitation of Actions Act.

(v) The learned magistrate erred in holding that the appellant was entirely liable to the respondent in absence of any direct evidence against the appellant.

(vi) The learned magistrate erred in law and in fact in holding that the alleged appellant the driver of the motor vehicle KAE 312N was driving under instruction of the appellant in the lawful course of employment.

(vii) The learned magistrate erred in law and in fact in holding that the respondent had proved his case on balance of probabilities.

(viii) the learned magistrate erred in law and in fact in holding that the appellant was liable to the respondent for kshs.144,577/=.

(ix) The learned magistrate erred in law and in fact in making judgment of Kshs.144,577/= without strict proof of the same.

(x) The learned magistrate erred in law in fact in holding that appellant was the owner of motor vehicle KAE 312 N without any proof.

(xi) The learned magistrate erred in holding the appellant liable in absence of strict proof of occurrence of the accident by the respondent.

14. Mr. Kabiru who argued the appeal for the appellant contended that ownership of motor vehicle KAC 990F was not established as the respondent did not produce any evidence of ownership of the motor vehicle. He submitted that this destroyed the substratum of the respondent's suit and therefore the suit ought to have failed. With regard to the issue of liability Mr. Kabiru submitted that the evidence of the two eye witnesses, that is, the respondent and his passenger, did not attribute any blame or wrong doing on the part of the driver of the tanker who is alleged to have caused the accident.

15. Mr. Kabiru pointed out that the assessment report showed the point of impact as the side of motor vehicle KAC 990F and not the rear of the vehicle. This was inconsistent with the evidence of the respondent who claimed the motor vehicle was hit from the rear. It was further maintained that there was contradiction between the evidence of the respondent and that of his passenger. It was submitted that contrary to the pleadings, the respondent did not prove that Ngugi was the driver of the motor vehicle or that vicarious liability attached on the appellant. Reliance was placed on the case of ***Khayugila vs Gigi & Co. Ltd & another [1986-1989] EA 276,*** wherein it was held that to establish the existence of an agency relationship it was necessary to show that the driver was using the car at the owner's request expressed, or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner**.** It was further maintained that the amendment of the plaint was improper as the court was improperly moved. In this regard, the case of ***Mohamedali Khatau Thaver vs Delphis Bank limited HCCC No.43 of 2003***, was relied upon.

16. Mr. Kabaiko who appeared for the respondent opposed the appeal. He submitted that the issue of ownership of the motor vehicle KAC 990F, not having been set out in the memorandum of appeal it was not open to the appellant to raise the issue. With regard to ownership of the tanker, it was maintained that a copy of record from the Registrar was produced and the defence witness also confirmed that the tanker belonged to the appellant.

17. Mr. Kabaiko maintained that the evidence before the trial magistrate was sufficient to establish the liability of the appellant. He submitted that the particulars of negligence set out in the plaint were established. With regard to the amendment, Mr. Kabaiko submitted that the application for amendment having been dealt with and a ruling delivered allowing the amendment, and no appeal having been preferred against that ruling, it was not open to the appellant to challenge the ruling at this stage. The court was therefore urged to dismiss the appeal.

18. I have carefully reconsidered and evaluated the evidence which was adduced before the lower court as

I am expected to do in this first appeal. There were several main issues that arose before the trial magistrate; first, was the ownership of the two motor vehicles involved in the accident i.e. the tanker and motor vehicle KAC 990F. Second, was the issue as to whether the two vehicles were actually involved in the accident subject of the respondent's action. Thirdly, was the issue if the tanker was involved in the accident, whether it was being driven by the appellant's driver for whose negligence the appellant is vicariously liable. Fourthly, whether the respondent's motor vehicle was damaged and if so, whether the special damages claimed were proved. Fifthly, whether the respondent's suit was statute barred and finally whether the court had jurisdiction to hear the respondent's suit.

19. Regarding the ownership of the two motor vehicles, there was ample evidence that the tanker belonged to the appellant. Indeed, notwithstanding the denial in the defence, the appellant's witness conceded ownership of the tanker. With regard to motor vehicle KAC 990F the respondent testified that the motor vehicle belonged to him. There was ample evidence that he insured the motor vehicle with Lion of Kenya Insurance Company which paid for the repair to the motor vehicle, and that the suit was actually being pursued by the insurance company under its rights of subrogation. In the circumstances, there was no reason to doubt the respondent's assertions that the motor vehicle belonged to him.

20. Further, there was ample evidence adduced by the respondent and his passenger regarding the occurrence of the accident. Their evidence was supported by the occurrence book from Pangani Police Station which confirmed that they reported the accident at the police station. Both the respondent and his passenger confirmed through the registration number of the motor vehicle that it was the tanker which knocked the respondent's motor vehicle. I find that there was sufficient evidence negating the appellant's contention that their vehicle was not involved in the accident.

21. With regard to how the accident occurred, it was apparent that there was inconsistency between the evidence of the respondent and that of his passenger regarding whether the respondent's motor vehicle was being driven on the inner lane or the outer lane. The inconsistency was however not very material. The witnesses were agreed that the tanker came from behind, hit the respondent's motor vehicle and proceeded on.

22. Again, there was an issue as to whether the respondent's motor vehicle was hit on the rear or on the side. It is evident from the assessment report that the damage to the motor vehicle was on the left side of the vehicle. The respondent's evidence was that the tanker damaged his motor vehicle "from the rear and along the side". Under cross-examination the respondent explained that the tanker "hit the side of my vehicle but starting from behind and along the passenger door". What this means as is evident from the assessment report, is that the respondent's motor vehicle was hit from the rear left side to the front left side and not the actual rear of the motor vehicle. Thus, the apparent contradiction is easily explained. I find that the accident was caused by the negligence of the driver of the tanker driving without due care and attention, negotiating the roundabout carelessly, and knocking into the respondent's motor vehicle when it was stationary.

23. With regard to the issue of vicarious liability, the fact that the driver of the tanker was in possession of the tanker is prima facie evidence that he was driving the vehicle as an agent or servant of the appellant. Moreover, the issue as to whether the driver was using the motor vehicle at the appellant's express or implied request or instruction was a matter which was specially within the knowledge of the appellant and therefore under Section 112 of the Evidence Act the burden was upon the appellant to disprove the fact that the tanker was being driven by its agent.

24. With regard to the special damages, the respondent adduced evidence through the assessment report and the receipts for payment confirming that a total sum of Kshs.144,677/= was incurred.

25. I do note that in his judgment, the trial magistrate addressed most of these issues. However, in assessing the evidence the trial magistrate appears to have misdirected herself by shifting the blame onto the appellant. For instance, in his judgment, the trial magistrate stated that the appellant failed to rebut the respondent's evidence that the tanker was involved in the accident on the material day. The trial magistrate also noted that the appellant's witness ought to have produced evidence to prove that their

vehicle was not in Nairobi, and that the driver of the tanker ought to have been called to render evidence and produce the day's movement of the tanker.

26. It is evident from this, that the trial magistrate effectively shifted the burden of proof onto the appellant. This was contrary to Section 107 and 108 of the Evidence Act. The burden of proof remained entirely upon the respondent who was alleging that an accident involving the tanker occurred. The appellant was not under any obligation to prove anything or to call any evidence. It was for the court to consider the evidence adduced before it by the respondent and determine whether the respondent's case was proved. Notwithstanding the error made by the trial magistrate, I am satisfied as above demonstrated that there was sufficient evidence to establish the respondent's case. I find that the appellant is liable to the respondent.

27. Further the respondent's cause of action arose on 19th December, 1998. The suit was filed in the lower court on 4th October, 2001 which was within the statutory period of 3 years for an action founded in tort. Although an amended plaint was filed on 23rd February, 2007 amending the name of the appellant from Asha Hershi Moghe t/a Bungoma total Service Station to Sahra Hershi Ali w/o Hershi Moghe t/a Bungoma Total Service Station. The amendment was not a complete substitution of the appellant but was merely correcting the name of the appellant who remained t/a Bungoma Total Service Station. For this reason, I am satisfied that the respondent's suit was filed within time.

28. With regard to the issue of jurisdiction the appellant had the right to raise a preliminary objection with regard to the court's jurisdiction. The appellant waived this right by submitting to the jurisdiction of the court in having the suit heard. It is therefore too late in the day to raise the objection.

Accordingly, I find no merit in this appeal and do therefore dismiss it with costs. Orders accordingly.

Dated and delivered this 18th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Kabaiko for the respondent

Court clerk - Ezekiel